SUPREME COURT, U. S.

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No. 489

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER SESSION, 1967

GOVERNOR LURLEEN BURNS WALLACE, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; ALABAMA STATE BOARD OF EDUCATION; ERNEST STONE, Secretary and Executive Officer of Alabama State Board of Education; JAMES D. NETTLES, ED DANNELLY, MRS. CARL STRANG, FRED L. MERRELL, W. M. BECK, VICTOR P. POOLE, W. C. DAVIS, CECIL WARD and HAROLD C. MARTIN, as members of Alabama State Board of Education,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

JURISDICTIONAL STATEMENT IN BEHALF OF APPELLANTS

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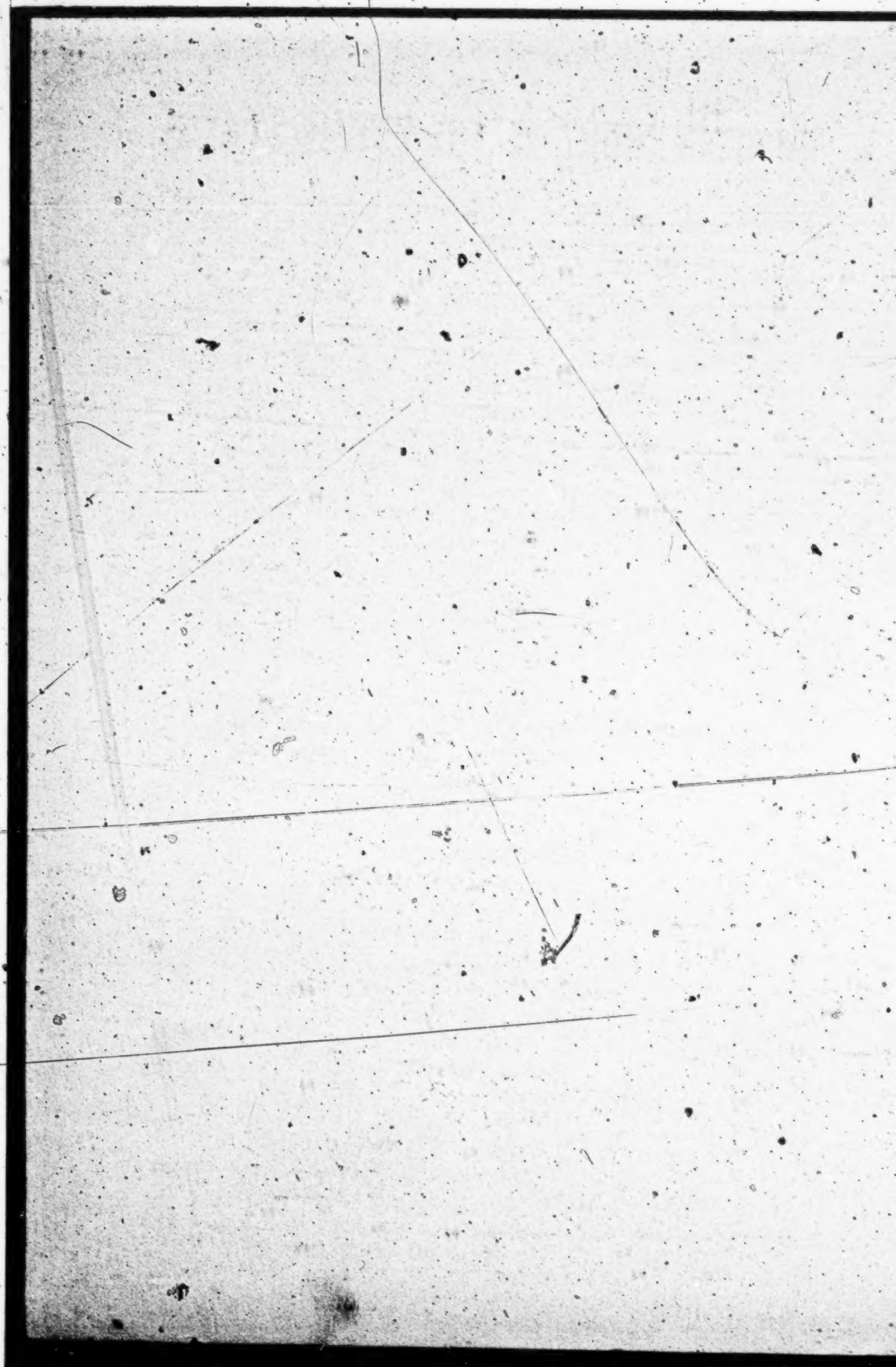

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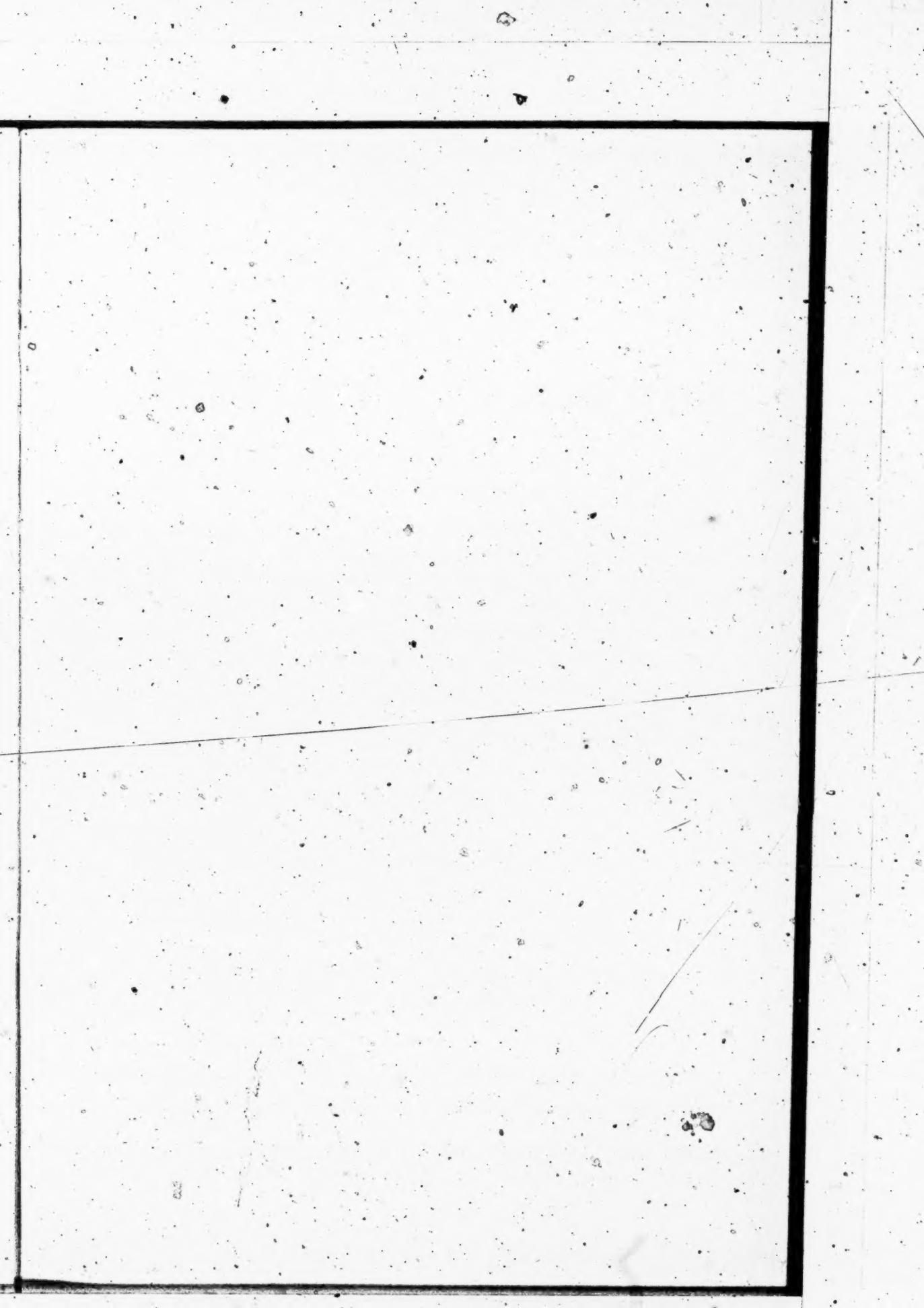

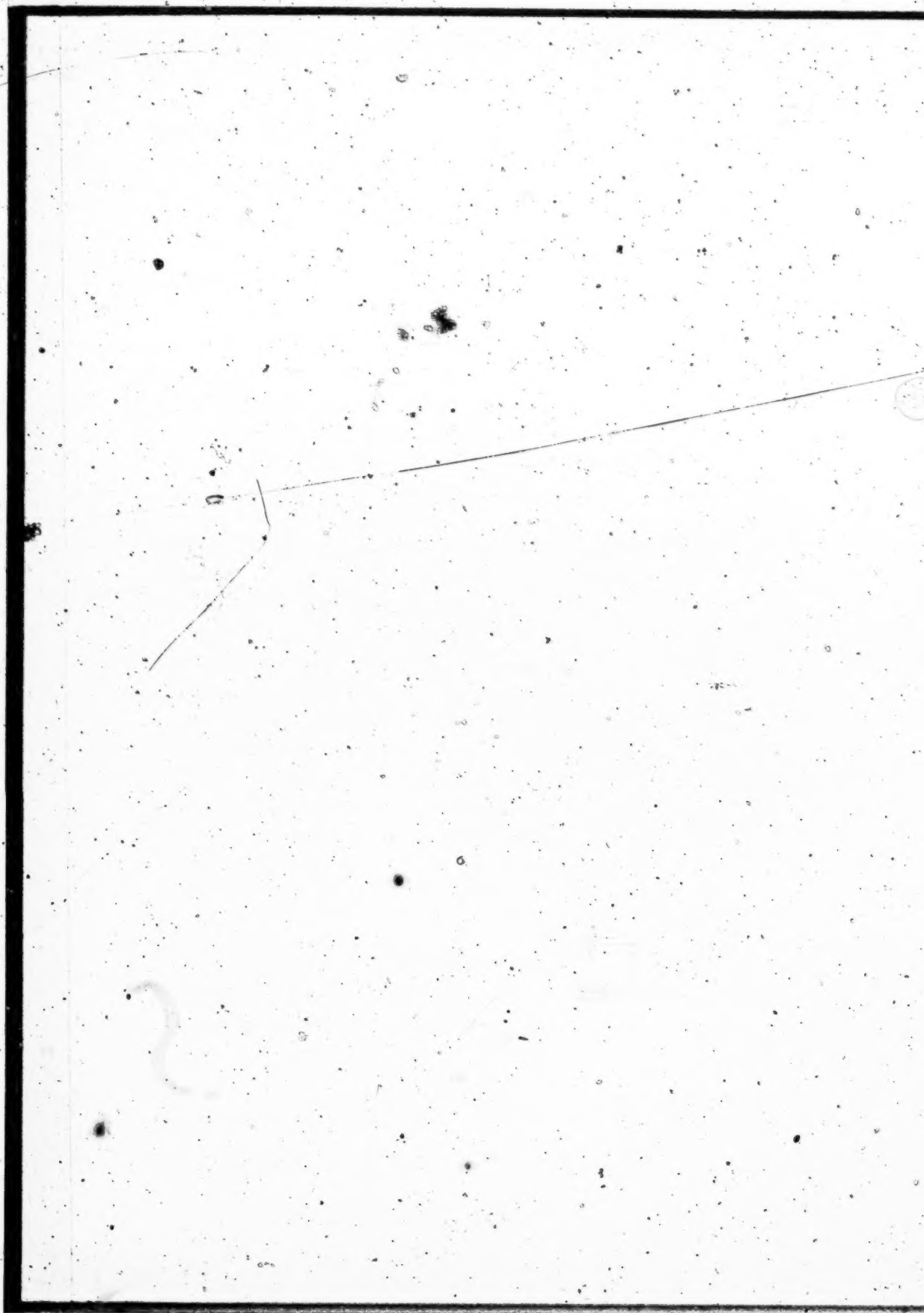

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER SESSION, 1967

GOVERNOR LURLEEN BURNS WALLACE, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; ALABAMA STATE BOARD OF EDUCATION; ERNEST STONE, Secretary and Executive Officer of Alabama State Board of Education; JAMES D. NETTLES, ED DANNELLY, MRS. CARL STRANG, FRED L. MERRELL, W. M. BECK, VICTOR P. POOLE, W. C. DAVIS, CECIL WARD and HAROLD C. MARTIN, as members of Alabama State Board of Education,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JURISDICTIONAL STATEMENT IN BEHALF OF APPELLANTS

1.

Reference to the Official and Unofficial Reports of the Decrees, Orders and Opinions Delivered in the Court Below

Decree dated March 22, 1967, signed by United States Circuit Judge Richard T. Rives, United States District

Judge H. H. Grooms and United States District Judge Frank M. Johnson, Jr., together with exhibits thereto which are a part thereof, a copy being appended hereto as Appendix 1.

Opinion filed March 22, 1967, signed by United States Circuit Judge Richard T. Rives, United States District Judge H. H. Grooms and United States District Judge Frank M. Johnson, Jr., in this case a copy being appended hereto as Appendix 2.

Reference is made under the rules of this Court to four prior opinions in this case, none of which are of materiality as to the issues here, but which are required by said rule of this Court:

Anthony T. Lee et al., and United States of America, Plaintiff and Amicus Curiae v. *Macon County Board of Education,* (1963) 221 F. Supp. 297.

United States v. *Wallace,* (1963), 222 F. Supp. 485.

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Lee and the United States of America, Plaintiff and Amicus Curiae v. *Macon County Board of Education,* (1964) 231 F. Supp. 743.

Opinions in companion cases and later proceedings, orders, and opinions in this case which are "necessary to ascertain the grounds of the judgment or decree" as provided in the rules of this Court, are as follows:

Opinion and dissenting opinion of the Court of Appeals of the Fifth Circuit in *United States of America, Intervenor and Linda Stout et als.* v. *Jefferson County Board of Education* rendered by a three-judge panel of that court on the 29th day of December, 1966 and reported in 372 F.2d 836.

Opinion and dissenting opinion of the Court of Appeals of the Fifth Circuit sitting en banc reviewing the

original opinion and decree rendered by the three-judge panel in the case of *United States of America, Intervenor and Linda Stout et als.* v. *Jefferson County Board of Education,* dated March 29, 1967, not yet reported, appended as Appendix 3.

Notice of Appeal to the Supreme Court of the United States filed by Governor Lurleen Burns Wallace et als., filed April 7, 1967, appended hereto as Appendix 4.

Motion for extension of time for the filing of the record and of the Jurisdictional Statement by the Appellants, filed on June 3, 1967, appended hereto as Appendix 5.

Order extending time to July 6, 1967 for the filing of the record and of the Jurisdictional Statement which is dated June 3, 1967, appended hereto as Appendix 6.

Motion for additional extension of time up to and including August 5, 1967, for the filing of the record and the Jurisdictional Statement by the appellants, appended hereto as Appendix 7.

Order extending the time up to and including August 5, 1967, for the filing of the record and of the Jurisdictional Statement, appended hereto as Appendix 8.

Order dated April 24, 1967, adding as defendants certain officials of the Autauga County, Bibb County, Cullman County and Pickens County school systems, appended hereto as Appendix 9.

Motion of Governor Lurleen Burns Wallace et als., filed May 13, 1967, to drop such persons as defendants, appended hereto as Appendix 10.

Order dated May 18, 1967, denying Motion of Governor Lurleen Burns Wallace et als., to Drop Defendants, denying objection of Bibb County Board of Education and its officials, dismissing as moot Autauga County, Cullman

County and Pickens County officials (as they have complied with all the requirements of the Court) and granting an injunction with a plan of desegregation attached against the Bibb County Board of Education and its officials, appended hereto as Appendix 11.

Order dated May 26, 1967, adding school officials of Marengo County, Linden City, Jasper City, Marion County and Thomasville City School Systems as defendants, appended hereto as Appendix 12.

Notice of Appeal to the Supreme Court of the United States by the Bibb County Board of Education and its officials, dated June 16, 1967, together with Notice of Appeal to the United States Court of Appeals for the Fifth Circuit, appended hereto as Appendix 13.

Cross designation of record for certification by the Department of Justice in response to Notice of Appeal by the Bibb County Board of Education and its officials, dated July 10, 1967, appended hereto as Appendix 14.

Order dated June 14, 1967, of the Court requiring certain actions by the Marion County School System, The Thomasville City School System, the Marengo County School System, the Linden City School System, and the Jasper City School System, including injunction, appended hereto as Appendix 15.

Order of the Court, dated June 26, 1967, finding that the officials of the City of Linden have complied with the Order and have been discharged as parties defendant and that the Marengo County officials are granted until July 15, 1967, within which to file further information, appended hereto as Appendix 16.

Order adding as parties defendant John W. Gardner, Secretary of Health, Education and Welfare, R. Peter

Libassi, United States Commissioner of Education, and James R. Dunn, Attorney for the Department of Health, Education and Welfare, dated July 14, 1967, appended hereto as Appendix 17.

Temporary restraining order and order setting cause for hearing, dated July 14, 1967, as to the Lanett City School System and affecting the newly added defendants as well as the Department of Justice and the United States District Attorney, appended hereto as Appendix 18.

Order dated July 28, 1967, copy of which is attached as Appendix 28.

Motion and order extending the time up to and including August 14, 1967, for the filing of the record and of the Jurisdictional Statement, appended hereto as Appendix 29.

2.

A Concise Statement of the Grounds on Which the Jurisdiction of the Court Is Invoked

The decree of the court below was a decree dated and entered on March 22, 1967, by a three-judge court constituted pursuant to Sections 2281 and 2284, Title 28 United States Gode, for the purpose of hearing this cause in United States District Court for the Middle District of Alabama, Eastern Division, composed of United States Circuit Judge Richard T. Rives and United States District Judges H. H. Grooms and Frank M. Johnson, Jr. This appeal is taken pursuant to 28 United States Code, Section 1253. Said Court was constituted, in accordance with the provisions of the statutes of the United States, by order granted on the 6th day of February, 1964, a copy of which is attached hereto as Appendix 21 (p. A256).

The judgment or decree sought to be reviewed and the time of its entry is the decree and opinion rendered and filed on March 22, 1967, copies of which have heretofore been referred to and attached as Appendices Nos. 1 and 2 to this Jurisdictional Statement (pp. A1-A67), together with the proceedings had thereafter upon the refusal of the three-judge court and of this Court to grant a stay pending appeal (pp. A149-A257).

The Notice of Appeal was filed on the 7th day of April, 1967, in the said three-judge court fully described above, a copy thereof having been attached hereto as Appendix 4 (p. A149). The time for the filing of the transcript of the record and the Jurisdictional Statement was extended to August 5, 1967, by the three-judge court (pp. A162-3, A170-1). A copy of the motions and orders resulting in such extension are attached as Appendices 5, 6, 7, and 8 (pp. A157-A171).

The statutory provision believed to confer jurisdiction of this appeal upon the Supreme Court of the United States is Title 28 Section 1253 of the United States Code Annotated having been enacted on June 25, 1948, c. 646, 62 Stat. 928.

3.

Nature of the Proceeding and the Statutes Pursuant to Which It Is Brought

This action was initiated by supplemental complaints filed by the United States of America acting through the Attorney General as plaintiff-intervenor and amicus curiae in September and November, 1966, seeking (a) to have declared unconstitutional a tuition grant law passed by the legislature of the State of Alabama and approved by the governor on September 1, 1965, which appears as Title

52, #61 (8) of the Code of Alabama and (b) as described by the three-judge court (p. A31) "asking for a state-wide desegregation order and an injunction against the use of state funds to support a dual school system."

We adopt as a part of this paragraph the allegations of the preceding paragraph numbered 2 entitled "A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED" describing the federal statutes pursuant to which this action purports to be brought.

In the said supplemental complaints and the decree granted herein (as well as the evidence introduced in this court) no relief was sought or granted against the Macon County Board of Education or in favor of any of the individual and original plaintiffs to this suit, except to the extent that the original plaintiffs and defendants are incidently affected by the declaration that the tuition grant law is unconstitutional. This is actually a proceeding which has been extended far beyond the jurisdiction of the three-judge court under the statutes above cited. As prosecuted and determined by the provisions of the opinion and the decree, this action now is:

(1) An action by the Attorney General of the United States against the officials of ninety-nine named Alabama school districts, none of whom were served with process, granted an opportunity to be heard, to cross-examine witnesses, to introduce evidence or to otherwise participate in the judicial proceeding which resulted in the decree and plan of desegregation embodied therein.

(2) No relief being sought or granted against the state officials joined in the supplemental proceeding in favor of the original plaintiffs as to the Macon County Board of Education, this is now an action brought by the Attorney

General of the United States against state officials to obtain an injunction requiring them, through judicial compulsion, to force the officials of ninety-nine school districts in Alabama to act in detailed and specified manners in the administration of their schools, without any evidential hearing concerning such schools and without any process of law whatsoever. The only issue in the orders "to show cause" has been whether the district involved has complied with the decree promulgated without due process of law upon such district.

(3) As no relief was sought or granted to the class represented by the individual plaintiffs who were students and parents of students in the Macon County Schools, this is now an action by the Attorney General alone without the initiation by or joinder of any members of the class or classes affected. These are the students in the ninety-nine public school systems affected and students and parents of students in trade schools, junior colleges and state colleges administered by the Alabama State Board of Education.

Hence the detailed discussion of matters occurring in relation to the Macon County Board of Education and activities of the various state officials connected therewith contained both in the opinion of the court and in the briefs filed by the Attorney General in the court below are incompetent, irrelevant and immaterial. In fact, the recitations contained in the opinion on pages A28 through A36 have no relationship whatsoever to the present proceeding.

A careful review of every page of the opinion of the court below (pp. A27 through A67) demonstrates that the evidence and the finding of the court thereon relate to local boards of education other than the Macon County Board of Education. This also demonstrates that the evi-

dence and the findings of the court relate to the students and parents in other districts and other schools. It is a travesty upon the American conception of justice for such findings to be made and compulsion to be invoked against persons having no opportunity to participate in the proceeding.

By the motion to dismiss filed in behalf of the defendant state officials, by objections entered into the record and by the pleadings herein filed, all of these constitutional questions were preserved. If jurisdiction is noted in this appeal and the record printed, detailed and particular reference may be made to these actions.

4.

The Cases Believed to Sustain the Jurisdiction of This Court

The following is a list of cases, statutes, and textbooks citations upon which we will rely in this appeal:

Armstrong v. *Board of Education of Birmingham*, 323 F.2d 333, 333 F.2d 47.

Avery v. *Wichita Falls Independent School District*, 1956, 241 F.2d 230.

Ballf v. *Kranz*, 82 F.2d 315 (1936).

Bell v. *School City of Gary*, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).

Board of Education of the Oklahoma City Public Schools v. *Dowell*, ... F.2d ..... (10th Cir., January 23, 1967, cert. denied, 35 U.S.L. Week 3418 (U.S. May 29, 1967).

Borders v. *Rippy*, 1957, 247 F.2d 268.

Boson v. *Rippy*, 285 F.2d 43, 48 (5th Cir. 1960).

Bowman v. *County School Board of Charles City County, Va.*, ... F.2d ..... (4th Cir., June 12, 1967).

Boynton v. *Commonwealth of Virginia*, 364 U.S. 454, 81 S. Ct. 182, 5 L. Ed. 2d 206.

Bradley v. *School Board of Richmond*, 345 F.2d 310 (4th Cir.), vacated and remanded on other grounds, 382 U.S. 103, 15 L. Ed. 2d 187, 86 S. Ct. 224 (1965).

Briggs v. *Elliott*, 132 F. Supp. 776 (E.D. S.C. 1955).

Brown v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873.

Brown v. *Board of Education of Topeka*, 347 U.S. 294 (1954).

Brown v. *Board of Education of Topeka*, 349 U.S. 294 (1955).

Burton v. *Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45.

Bush v. *Orleans Parish School Board*, 308 F.2d 491.

Calhoun v. *Latimer*, 321 F.2d 302 (5th Cir., 1963).

Calhoun v. *Latimer*, 377 U.S. 263 (1964).

City of Montgomery v. *Gilmore*, 1960, 277 F.2d 364.

Clark v. *Board of Education of Little Rock School Dist.*, 369 F.2d 661 (8th Cir., 1966), rehearing denied, 374 F.2d 569 (8th Cir., 1967).

Clute v. *Superior Ct.*, 155 Cal. 15, 99 P. 362, 132 Am. St. Rep. 54 (1908).

Cohen v. *Public Housing Administration*, 1958, 257 F.2d 73.

Cooper v. *Aaron*, 358 U.S. 1, 19 (1958).

Deal v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir., 1966).

Denzel Milton Lee v. *United States of America*, 322 F.2d 770.

Downs v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir., 1964), cert. denied, 380 U.S. 914 (1965).

East Baton Rouge Parish School Board v. *Davis*, 289 F.2d 380 (5th Cir., 1961), cert. denied, 368 U.S. 831.

Evans v. *Ennis*, 281 F.2d 385.

Evers v. *Jackson*, 1964, 328 F.2d 408.

Goss v. *Board of Education of City of Knoxville*, 373 U.S. 683, 687, 689 (1963).

Green v. *County School Board of New Kent County, Virginia*, ... F.2d ..... (4th Cir., June 12, 1967).

Green v. *United States*, 283 F.2d 687 (1960).

Helbig v. *Phillips*, 109 N.J. Eq. 546, 158 Atl. 441, 93 A.L.R. 706.

Helms Groover & Dubber Co. v. *Copenhagen*, (1919) 93 Ore. 410, 177 P. 935.

Henderson v. *United States*, 339 U.S. 816, 70 S. Ct. 843, 94 L. Ed. 1302.

Hovey v. *McDonald*, 27 L. Ed. 888, 891, 109 U.S. 150.

In re Henry v. *Wolenski*, (1963) 324 F.2d 309.

James Tomez et al. v. *Board of Education, Waukegan City School District*, Supreme Court of Illinois, Docket No. 40292, rendered March 23, 1967.

Jeffers v. *Whitley*, 309 F.2d 621.

Jefferson County Board of Education v. *Linda Stout et al.*, Slip Opinions dated December 29, 1966, and March 29, 1967.

Johnson v. *Virginia*, 373 U.S. 61, 83 S. Ct. 1053.

Kelley v. *Atheiner School District*, Docket No. 18528, Court of Appeals of the 8th Circuit, decided April 12, 1967, not yet reported.

Kelley v. *Board of Education of City of Nashville*, 270 F.2d 209 (6th Cir., 1959).

Lockett v. *Board of Education of Muscogee County*, 342 F.2d 225 (5th Cir., 1965).

Longview Tugboat Company v. *Jameson*, 218 F.2d 547 (1955).

Maryland v. *Limburg*, 87 F. Supp. 308, 313.

Merrimack River Sav. Bank v. *Clay Center*, 55 L. Ed. 320, 219 U.S. 527.

Migel v. *McCarl*, 291 U.S. 442, 78 L. Ed. 901.

Monroe v. *Board of Commissioners of City of Jackson, Tennessee*, rendered July 21, 1967 by Court of Appeals of the 6th Circuit, No. 17118 upon its docket, not yet reported.

Olson v. *Board of Education of Malverne, New York*, 250 F. Supp. 1000, 1006 (E.D. N.Y. 1966).

Opinion of the Justices of the Supreme Court of Alabama, 160 So.2d 648.

Pennsylvania R. R. Co. v. *National Docks Co.*, 54 N.J Eq. 647, 35 Atl. 433.

Peterson v. *City of Greenville*, 373 U.S. 244, 83 S. Ct. 1119.

Petrowski v. *Nutt*, 161 F.2d 938 (1947).

Rippy v. *Borders*, 1957, 257 F.2d 73.

Rogers v. *Paul*, 382 U.S. 198 (1965).

Rogers v. *Paul*, 345 F.2d 117, 86 S. Ct. 358.

Shelley v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161.

Shields v. *Barrow*, 1855, 17 How. 129, 58 U.S. 129, 15 L. Ed. 158.

Shuttlesworth v. *Birmingham Board of Education*, 358 U.S. 101 (1958).

Smith v. *Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987.

Springfield School Committee v. *Barksdale*, 348 F.2d 261, 264 (1st Cir., 1965).

Standard Oil Company v. *Marshall*, 265 F.2d 46.

tate of Washington v. *U. S.*, 87 F.2d 421.

Steele v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S. Ct. 226.

Stell v. *Savannah-Chatham County Board of Education*, 333 F.2d 55, 59 (5th Cir., 1964).

Stewart v. *Superior Ct.*, (1893) 100 Cal. 543, 35 P. 156.

Strauder v. *West Virginia*, 100 U.S. 303, 25 L. Ed. 664.

Swain v. *Alabama*, 380 U.S. 202, 226-28 (1965).

Swann v. *Charlotte—Mecklenburg Board of Education*, 369 F.2d 29.

United States et al. v. *Jefferson County Board of Education et al.*, ... F.2d .....

Virginia R. Co. v. *United States*, 71 L. Ed. 463, 469, 272 U.S. 685.

Warner Valley Stock Co. v. *Smith*, 165 U.S. 28, 41 L. Ed. 621.

Watson v. *City of Memphis*, 373 U.S. 526, 83 S. Ct. 1314.

White v. *Administrator of General Services Admin. of U. S.*, 343 F.2d 444 (1965).

Winters v. *New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665.

Civil Rights Act of 1964, 78 Stats. 246, Sections 401, 407, 601, 602 and 604.

Constitution of the United States: Fourteenth Amendment.

28 U.S.C., Paragraph 1254 (1).

Bickel, "The Decade of School Desegregation," 64 Colum. L. Rev. 193, 213-15 (1964).

Code of Alabama 1940, Title 52, Sections 61 (4), 62, 71, 73, 74, 76.

Cyclopedia of Federal Procedure, 3rd Ed., V. 15, Para. 84, 34, p. 353.

4 Am. Jur. 2d, Sec. 387, p. 855.

93 A.L.R. 710.

Title 28, U.S.C., Sec. 1253.

Dr. Max Wolff, "The Educational Park," Conference on Education and Racial Imbalance in the City, p. 4 (March, 1967).

Racial Isolation in the Public Schools (1967).

Survey of School Desegregation in the Southern and Border States, 1965-1966 (February, 1966).

There is involved the validity of the Tuition Grant Statute of Alabama including Act of Alabama 1965, #61 (8), Title 52, Code of Alabama, a copy thereof being attached hereto as Appendix 25, and made a part hereof as if fully copied herein.

If a motion to dismiss or affirm is filed under Rule 16.1 of this Court, we will expect to file opposing brief detailing the effect of such cases which sustain this appeal, as is provided by Rule 16.3 of the rules of this Court.

5.

Questions Presented by the Appeal, Expressed in the Terms and Circumstances of the Case but Without Unnecessary Detail

1. None of the original plaintiffs (members of the class attending schools in Macon County) and none of original defendants (the members of the Macon County Board of Education) were affected by the decree rendered by this Court on March 22, 1967, nor are any of such parties appellants or appellees herein. Can this supplementary proceeding filed by the Attorney General of the United States as Intervenor and Plaintiff be maintained against state officers of Alabama when the only actual parties having an interest in the controversy are ninety-nine local school districts, the officials and students of which were not parties to the suit, have had no opportunity to be heard in the determination of all issues, formulation of decree and plan of desegregation contained

therein, without due process of law and contrary to the Constitution of the United States and particularly the Fifth Amendment thereof?

2. Under the Civil Rights Act of 1964 and other statutory provisions (particlarly section 407(a) of said Act), does the Attorney General of the United States have the right to prosecute this suit as plaintiff-intervenor without either allegation or proof complying with the conditions precedent set forth in said act as to the public schools, trade schools, junior colleges, or state colleges affected hereby?

3. Does the Court here have the authority to mandatorially enjoin state officials (particularly the State Superintendent of Education) to require action by ninety-nine local school districts, as to which such state officials have no authority under the Constitution and Statutes of Alabama and particularly:

(a) The placement, assignment and transfer of students.

(b) The transfer or reassignment of teachers.

(c) The closing of public schools.

(d) The control of expenditure of funds in the nature of grants-in-aid to students in the public school system.

(e) The furnishing, direction and control of the transportation of pupils.

(f) The location and construction of school facilities.

4. Did the lower court have the authority to grant a mandatory injunction requiring affirmative detailed and continuous administrative actions by state and local of-

ficials which destroys their "academic freedom" and constitutes an intricate process of judicial administration of such schools and colleges, contrary to the Constitution and Statutes of Alabama and contrary to the Constitution of the United States and particularly the Tenth and Eleventh Amendments thereof, and in violation of the Constitutional separation of governmental powers between the United States of America and the States, and also such separation of powers between the judicial, executive and legislative branches of the States and the United States?

5. Is Title 52, Section 61 (8), Code of Alabama (Tuition Grant Statute, No. 687 approved September 1, 1965), unconstitutional?

6. Did the lower court have the constitutional and statutory authority to enter a Uniform Decree affecting at least ninety-nine of the school districts in the State of Alabama, requiring each of them to adopt a uniform "plan of desegregation" without any evidentiary hearing by a local United States District Court, thereby denying the local school boards the right to prepare and submit a plan which is proper under local conditions to meet the constitutional requirements, in direct violation of the decisions of the Supreme Court of the United States and the decisions of all of the Courts of Appeal of the United States?

7. Did the lower court have the right to grant a mandatory injunction requiring the adoption of a "plan of desegregation" drawn and calculated to destroy the freedom of choice of all students, arbitrarily and capriciously requiring assignment of all students and teachers in every school and college without any evidentiary hearing, contrary to the decisions of the Supreme Court of

the United States and of all Courts of Appeals of the United States in many particulars, including the following:

(a) Requiring discriminatory actions by giving preference to students and teachers because of their race in violation of the Fourteenth Amendment.

(b) Requiring a mandatory annual choice by all students in every grade of the schools.

(c) Requiring in the absence of the exercise of a choice that a student "shall be assigned to the school nearest his home where space is available", and that, in assigning students to schools, "no preference shall be given to any student for prior attendance of a school".

(d) Requiring construction of schools and closing of schools for the purpose of desegregation.

(e) Requiring without any evidentiary hearing local expenditures for "physical facilities, equipment, services, courses of instruction and instructional materials" regardless of the ability of either local authorities or state authorities to finance such actions?

8. Did the lower court have the right to enter a Decree contrary to the action of the Congress of the United States under Section 5 of the Fourteenth Amendment providing that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article", such Decree violating the Congressional definition of "discrimination" as applied to the public schools contained in Public Law 88-352 (Civil Rights Act of 1964), particularly Sections 401 (b), 407 (a), 410, 602, 604, 702 and 702 (j) thereof, and Section 604 of the Elementary and Secondary Education Act of 1965 as amended on October 6, 1966?

9. Did the lower court have the right to enter a Decree affecting all school districts, trade schools, junior colleges, state colleges and students thereof, in an action brought by representatives of a class consisting solely of students in the Macon County School District lacking common grounds of fact and law?

10. Did the intervention of the United States of America herein permit the Attorney General to obtain the decree here, contrary to the requirements of the statutes of the United States?

11. Did the lower court have the consitutional or statutory right to divest the United States District Courts of Alabama of their jurisdiction over the public schools, trade schools, junior colleges and colleges located within their districts?

12. Was it error fc the lower court to grant a mandatory injunction which in effect nullifies and holds void and unconstitutional the Alabama School Placement Law, Act No. 201 of the Legislature of Alabama, Regular Session 1955, enacted August 3, 1955, as amended?

13. Was it error for the lower court to deny the motion of Ernest Stone, Superintendent of Education of Alabama, to dismiss this proceeding?

6.

Due Process of Law Is Violated by the Decree Granted in This Case. The Ninety-Nine Local School Districts (the Actual Defendants Whose Rights Are Affected) Have Not Been Served with Process nor Have They Had an Opportunity to Be Heard

If the scope of relief sought in this proceeding had been limited to judgments or decrees affecting solely the rights, duties and powers of state officials, the local school officials would not have been necessary parties. In this

proceeding the Court may limit the scope of the issues and relief granted to actions materially affecting only the parties to the suit. Local school officials are not necessary parties to a suit which only affects the rights, powers and duties of a state officer. But when *their* rights, powers and duties are materially affected, such local officers are necessary, and, to that extent, indispensable parties. It is one thing to enjoin the State Superintendent of Education (or any other state official) from improperly performing his duties and powers and quite another thing to require him by mandatory injunction to force local school officials to act as he may demand. This certainly may not be done without due process of law in a proceeding in which the local officials have not had the opportunity to be heard. Their local school systems might be destroyed by orders granted in a proceeding to which they are not parties.

The relief prayed for by the Plaintiffs and Intervenors in Civil Action No. 604-E (Appellee here) would, among other things, prevent the disbursement of state funds by state officials to separate school districts dependent upon such funds for the discharge of their statutory and constitutional duties. That such school districts have an interest in the continuing flow of authorized and appropriated funds admits of no question. It is equally obvious that equity and good conscience will not tolerate a decree enjoining the disbursement of funds to a few school districts which might be made parties-Defendants while leaving unfettered the flow of funds to other school districts within the state.

The Court of Appeals of the Fifth Circuit in *Standard Oil Company* v. *Marshall*, 265 F.2d 46, stated that "the classic definition of indispensable parties is that in *Shields* v. *Barrow*, 1855, 17 How. 129; 58 U.S. 129, 15 L. Ed. 158."

Such definition by this Court, which has prevailed and is still recognized after one hundred twelve years, defines the three classes of parties to a suit as follows:

> "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. *These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court* so that the court can proceed to a decree, and do complete and final justice, *without affecting other persons not before the court,* the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition *that its final termination may be wholly inconsistent with equity and good conscience.*"

In *State of Washington* v. *U. S.*, 87 F.2d 421, the Court of Appeals of the Ninth Circuit quoted numerous decisions of the Supreme Court of the United States including the following:

> "In Barney v. Baltimore, 73 U.S. (6 Wall.) 280, 284, 18 L. Ed. 825, it is said: 'There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. *But if this cannot be done, it will proceed to administer such relief as may be in its power,* between the parties before it.

> And there is a third class, whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to the jurisdiction . . .'"
>
> "In cases where there is error in nonjoinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as 'jurisdictional'. The defect is not, properly speaking, a jurisdictional one as shown by the following quotation from *Shields* v. *Barrow*, supra, 17 How. 130, 141, 15 L. Ed. 158: 'As is observed by this court, in *Mallow* v. *Hinde*, 12 Wheat. (193) 198 (6 L. Ed. 599), when speaking of a case where an indispensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; *we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.*' See, also, *Barney* v. *Baltimore*, supra, 6 Wall. 280, 285, 18 L. Ed. 825; *State of California* v. *Southern Pac. Co.*, supra, 157 U.S. 229, 250, 15 S. Ct. 591, 39 L. Ed. 683; *Minnesota* v. *Northern Securities Co.*, supra, 184 U.S. 199, 236, 22 S. Ct. 308, 46 L. Ed. 499; *Bogart* v. *Southern Pac. Co.*, supra, 228 U.S. 137, 146, 33 S. Ct. 497, 57 L. Ed. 768."

Certainly this Court may "proceed to administer such relief as may be in its power, between the *parties before it*" but just as surely *"no Court can adjudicate directly upon a person's right without the party being either actually or constructively before the Court."*

The extent to which these ninety-nine school districts have had their rights affected without due process of law

prior to adjudication is demonstrated by the following extracts from the order of the three-judge court dated July 28, 1967:

> Under the facts now presented, this Court now specifically finds and concludes that the City of Lanett school system and the other 98 school systems listed in the order of this Court of March 22, 1967, were, when said order was entered and served, made "subject to a final order of a court of the United States for the desegregation" of such school systems within the meaning of 45 C.F.R. 80.4(c) . . . (App. p. A298)
>
> To permit the Department of Health, Education and Welfare to terminate funds to school systems under the order of this Court would be an abdication on the part of the Court of its authority to require compliance with a court order. There can be no administrative supervision or review of a judicial decree. There must be judicial approval of the termination of federal financial assistance when a school system is operating under a court order. The temporary restraining order entered in this case on July 14, 1967, will be enlarged into a preliminary injunction. (App. p. A303)

7.

The Appellant State Officials Do Not Possess the Statutory Authority to Control the Actions of Local School Boards to the Extent Required by the Mandamus (or Mandatory Injunction) Granted Below

These defendant state officials completely lack the power under the Alabama Constitution and statutes to take the actions which would be required of them by the plaintiffs and by the decree submitted to the Court for consideration. The basic framework of the actions attempted to be required by injunction, either directly or by the withholding of state funds, consists of:

1. The placement, assignment and transfer of pupils from one public school to another public school within a city or county school system.

2. The transfer or reassignment of teachers from one public school to another public school within a city or county system.

3. The closing of public schools within a city or county school system.

4. The expenditure of funds in the nature of grants-in-aid to students in the public school system.

5. The furnishing, direction and control of the transportation of pupils within any city or county school system.

Each and every one of the above powers and duties has been expressly held by the Supreme Court of Alabama to be vested in "the local school boards of education". The Supreme Court of Alabama has specifically held that the defendants in these causes have no authority in relation to such matters.

The responsibility for public education in Alabama has traditionally centered at the local level. Title 52, Section 62, Code of Alabama 1940, provides as follows:

> The general administration and supervision of the public schools of the educational interests of each county, with the exception of cities having a city board of education, shall be vested in the county board of education.

The philosophy that the education of children is a community concern and should be directed and controlled at the local level is clearly set forth in the various statutes contained in Title 52 of the Alabama Code.

Section 71 provides that real estate and other property of public schools is vested in, and held in trust by, the County Boards of Education which shall maintain a uniform and effective system of public schools throughout their respective counties. Section 73 provides that "the County Boards of Education shall determine, with and on the advice of the County Superintendent of Education, the educational policy of the County, and shall prescribe rules and regulations for the control and management of the schools." Section 74 provides that,

> . . . the County Board of Education shall exercise through its executive officers, the County Superintendent of Education and his professional assistants, control and supervision of the public school system of the County. The Board shall consult and advise through its executives and his professional assistants, with school trustees, principals, teachers and interested citizens, and shall seek in every way to promote the interests of the schools under its jurisdiction.

Section 76 provides that "the County Board of Education shall consolidate schools whenever in its judgment it is practicable, and arrange, if necessary, for the transportation of pupils to and from such consolidated schools. . . ." Section 82 sets forth the procedure which must be followed by County and City Boards of Education in order to effect the consolidation of City and County School Systems. Among other requirements, this section provides for a referendum to be held in the affected county. Section 86 provides that the County Board of Education shall appoint all principals, teachers and assistants authorized by the Board. Section 87 provides that the County Board shall prescribe the courses of study for the schools under its jurisdiction. Section 61(4), et seq., confers on the local boards the sole responsibility and authority for

assignment and transfer of students and teachers, and such boards are constituted judicial tribunals for this purpose.

It is true that the State Board of Education is granted by statute "general control and supervision" over the public schools. Title 52, Section 14. However, as the Alabama Supreme Court emphatically pointed out in Opinion of the Justices, copy of which is attached to the application for stay, this general supervisory authority does not supersede or impair the specific responsibilities conferred upon the local boards by statute.

A survey of the statutes granting specific responsibilities to the State Board of Education reveals that in practical effect it is primarily a coordinating agency whose primary functions consist of providing technical services for the local board and rendering informational advice and assistance when requested. The State Board establishes policies binding on the local systems only in instances specifically defined and delineated by statute, such as the establishment of minimum standards governing sanitation, construction sites, courses of study, grading of schools, and teacher training. Title 52, Section 14, et seq. The State Board is responsible generally for the administration of the minimum program fund, but such responsibility consists primarily of carrying out a highly detailed and inflexible formula established by the legislature for the the distribution of funds to the various local systems, Title 52, Section 208, et seq. The responsibility for meeting the requisite criteria for becoming eligible for participation in the fund rests with each local board.

Referring to the opinion of the Supreme Court of Alabama, attached hereto as Appendix 20, this three-judge court said (231 F. Supp. 743, 755) in the former appearance of this case:

> This court recognizes the authority of the Supreme Court of Alabama when it interprets the Alabama law, as it informally did in these advisory opinions.

Although the Court referred to "these informal opinions", the opinion was rendered by the Supreme Court of Alabama by authority of and in accordance with the statute of the State and hence, as recognized, is valid and binding. Thereafter a similar question was before the Supreme Court of the United States in *Shuttlesworth* v. *Birmingham*, 15 L. Ed. 2d 176, decided on November 15, 1965. Mr. Justice Stewart delivered the opinion of the Supreme Court and referred to the construction of an Alabama statute by the Alabama courts and said:

> It is our duty, of course, to accept this state judicial construction of the ordinance. Winters v. New York, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665; United States v. Burnison, 339 U.S. 87, 94 L. Ed. 675, 70 S. Ct. 503; Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U.S. 495, 92 L. Ed. 99, 68 S. Ct. 167.

There is no need to multiply authorities but in *Winters*, thus cited as supporting the statement of law contained in *Shuttlesworth*, the Supreme Court of the United States referred to the construction of a state statute by the Court of Appeals of New York and then said:

> This construction fixes the meaning of the statute for this case. *The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature.* Hebert v. Louisiana, 272 U.S. 312, 317, 71 L. Ed. 270, 273, 47 S. Ct. 103, 48 A.L.R. 1102; Skiriotes v. Florida, 313 U.S. 69, 79, 85 L. Ed. 1193, 1201, 61 S. Ct. 924.

A detailed comparison of the decree of this Court and the opinion of the Supreme Court of Alabama at-

tached as Appendix 20 demonstrates that the injunction granted in the decree here cannot be maintained unless this Court holds that the State Superintendent of Education or the other defendants possess authority expressly negatived by the Constitution and the statutes of the State of Alabama as construed by the Supreme Court thereof.

8.

The Decree and Opinion Herein Violate the Constitution of the United States, the Decisions of the Supreme Court of the United States and of the Courts of Appeals of All of the Circuits (Including the Fifth Circuit) with the Exception of Jefferson County

The chaos now existing in the application of the Constitution of the United States to the administration of public schools is best illustrated by the conflict between all prior cases decided by the Court of Appeals of the Fifth Circuit and *Jefferson County*. Approximately fifty prior decisions of the Fifth Circuit were in fact overruled by *Jefferson County* but we quote from several of those cases which were expressly overruled being *Avery* v. *Wichita Falls Ind. School Dist.*, 241 F.2d 230; *Borders* v. *Rippy*, 247 F.2d 268; *Cohen* v. *Public Housing Adm.*, 257 F.2d 73; *Boson* v. *Rippy*, 285 F.2d 43; *Evers* v. *Jackson Municipal Separate School Dist.*, 328 F.2d 408; *Stell* v. *Savannah-Chatham County Board of Education*, 333 F.2d 55:

Prior Decisions of the Fifth Circuit	*Jefferson County*
Avery:	*Page 4 of the slip opinion*:
The Constitution as construed in the School Segregation Cases, Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873;	The United States Constitution, as construed in *Brown*, requires public school systems to integrate students, faculties, facilities

Prior Decisions of the Fifth Circuit

Id., 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, and Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884, forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races.

Avery:

As was well said in Briggs v. Elliott, D.C.E.D.S.C., 132 F. Supp. 776, 777: ". . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals." Keeping that principle in mind, we cannot say that the district court abused its discretion.

Jefferson County

and activities. If *Brown I* left any doubt as to the affirmative duty of states to furnish a fully integrated education to Negroes as a class, *Brown II* resolved that doubt.

Page 39 of the slip opinion:

The portion of the opinion most quoted is pure dictum. *Briggs* did not paraphrase the law as the Supreme Court stated it in *Brown* or as the law must be stated today in the light of *Aaron* v. *Cooper*, *Rogers* v. *Paul* and *Bradley* v. *School Board*. These and other decisions compel states in this circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities, and activities.

Page 40 of the slip opinion:

This Court and other courts gratuitously for the most part, have often paraphrased or quoted with approval the Briggs dictum.

Prior Decisions of the Fifth Circuit	*Jefferson County*
Borders:	*Page 73 of the slip opinion*:
The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools.	The only relief approaching adequacy is the conversion of the still-functioning dual system to a unitary, non-racial system — lock, stock and barrel. If this process be "integration" according to the 1955 *Briggs* court, so be it. In 1966, this remedy is the relief commanded by *Brown*, the Constitution, the Past, the Present, and the way foreimage of the Future.
Cohen:	*Page 53 of the slip opinion*:
Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races but only negatively to forbid governmentally enforced segregation. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233; Rippy v. Borders, 5 Cir., 1957, 250 F.2d 690, 692.	In a school system the persons capable of giving class reliefs are of course its administrators. It is they who are under the affirmative duty to take corrective action toward the goal of one integrated system.
Boson:	*Page 65 of the slip opinion*:
"The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requir-	"The defendants argue, nevertheless, that there is no constitutional mandate to remedy racial imbalance." Ball v. School City of Gary, 324 F.2d 209 (7th Cir. 1963).

Prior Decisions of the Fifth Circuit	*Jefferson County*
ing segregation on account of their race or color of children in the public schools." Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233.	But that is not the question. The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system. . . . Brown answered that question affirmatively in the context of coerced segregation.
Evers I:	*Page 38 of the slip opinion:*
This is not to say that the Fourteenth Amendment commands integration of the races in the schools, or that voluntary segregation is not legally permissible. . . . The Supreme Court did not hold otherwise in Brown v. Board of Education, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873. Its holding was that enforced racial segregation in the public schools is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. Cooper v. Aaron, 1958, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5.	The defendants contend that the Guidelines require integration, not just desegregation; that school boards have no affirmative duty to integrate. They say that in this respect the Guidelines are contrary to the provisions of the Civil Rights Act of 1964 and to constitutional intent expressed in the Act. This argument rests on nothing that the United States Supreme Court held or said in *Brown* or in any other case.
Stell:	*Page 9 of the slip opinion:*
No court has required a "compulsory racially integrated school system" to meet the constitutional mandate that there be no dis-	Less and less have courts accepted the question-begging distinction between "desegregation" and "integration" as a sanctuary for

Prior Decisions of the Fifth Circuit	*Jefferson County*
crimination on the basis of race in the operation of public schools. See Evers v. Jackson Municipal Separate School District, 5 Cir., 1964, 328 F.2d 408, and cases there cited. The interdiction is against enforced racial segregation.	school boards fleeing from their constitutional duty to establish an integrated, non-racial school system.

A comparison of the decree which was adopted in *Jefferson County* by the Fifth Circuit Court of Appeals (without any evidential hearing, without regard to local conditions and without action by any district court, pages A126 through A135, as a uniform decree to be applied throughout the Circuit) with the decree rendered in this case (pp. A1 through A23) demonstrates that they are identical in most material particulars. The slight difference in wording will have no material effect.

Also it will be noted that the opinion in this case (pp. A27 through A67) carefully skirts the express and frank position taken in *Jefferson County* overruling all previous applicable cases decided by the Fifth Circuit. Nevertheless, the three-judge court here arrives at the same result and enters what is practically the same decree.

Hence it is necessary in this Jurisdictional Statement to compare the decisions of the Courts of Appeals of other Circuits, and of other Courts, with decision of this three-judge court and the decision of the Court of Appeals of the Fifth Circuit in *Jefferson County,* all construed in pari materia. Such comparison demonstrates that confusion is "thrice confounded".

Rather than making this Jurisdictional Statement an argumentative brief, we will quote the Courts which pre-

sent our position more clearly and succinctly than we ourselves could do. The most recent decision of a Court of Appeals which is in accord with the fifty decisions of the Fifth Circuit prior to *Jefferson County* and which directly conflicts with the latter decision is that of *Brenda K. Monroe et al.* v. *Board of Commissioners, City of Jackson, Tennessee, et al.*, decided by the Court of Appeals of the Sixth Circuit on July 21, 1967, involving Appeals Nos. 17,118 and 17,119 in that Court. Therein the Sixth Circuit said the following (a complete copy of the opinion of the Court is attached as Appendix 24, pages A259 to A270):

(1) COMPULSORY INTEGRATION.

Appellants argue that the courts must now, by reconsidering the implications of the *Brown* v. *Board of Education* decisions in 347 U.S. 483 (1954) and 349 U.S. 294 (1955), and upon their own evaluation of the commands of the Fourteenth Amendment, require school authorities to take affirmative steps to eradicate that racial imbalance in their schools which is the product of the residential pattern of the Negro and white neighborhoods. The District Judge's opinion discusses pertinent authorities and concludes that the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan. We agree with his conclusion. We have so recently expressed our like view in *Tina Deal, et al.* v. *The Cincinnati Board of Education*, 369 F.2d 55 (C.A. 6, 1966), petition for cert. filed, 35 LW 3394 (U.S. May 5, 1967) (No. 1358), that we will not here repeat Chief Judge Weick's careful exposition of the relevant law of this and other circuits. He concluded "We read *Brown* as prohibiting only enforced segregation." 369 F.2d at 60. We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long be-

fore *Brown*, whereas we consider here Tennessee schools desegregated only after and in obedience to *Brown*. We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states which, prior to *Brown*, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation—this to be true even though the current problem be the same in each state.

We are asked to follow *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (C.A. 5, 1966), which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. This decision decrees a dramatic writ calling for mandatory and immediate integration. In so doing, it distinguished *Bell* v. *School City of Gary, Indiana*, 324 F.2d 209 (C.A. 7, 1963), cert. den. 377 U.S. 924, on the ground that no pre-Brown de jure segregation had existed in the City of Gary, Indiana. 372 F.2d at 873. It would probably find like distinction in our *Tina Deal* decision because of Cincinnati's long ago desegregation of its schools. We, however, have applied the rule of *Tina Deal* to the schools of Tennessee. In *Mapp* v. *Board of Education*, 373 F.2d 75, 78 (C.A. 6, 1967), Judge Weick said,

> "To the extent that plaintiffs' contention is based on the assumption that the School Board is under a constitutional duty to balance the races in the school system in conformity with some mathematical formula, it is in conflict with our recent decision in *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966)."

However ugly and evil the biracial school systems appear in contemporary thinking, they were, as Jefferson, supra, concedes, de jure and were once found lawful in Plessy v. *Ferguson*, 163 U.S. 537 (1896), *and*

such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation—U. S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

This is not to say that Tennessee school authorities can dishonestly construct or deliberately contrive a system for the purpose of perpetrating a "maximum amount" of its pre-Brown segregation. *Northcross* v. *Board of Education of City of Memphis,* 33 F.2d 661, 664 (C.A. 6, 1964). *But to the extent that United States* v. *Jefferson County Board of Education, and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in Deal, we respectfully decline to follow them.*

In *Monroe* the Sixth Circuit approved the opinion of the District Court, 244 F. Supp. 353, which construed *Goss* v. *Board of Education of Knoxville,* 373 U.S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632. The district court quoted *Goss* including the finding by this Court therein:

> This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein. But no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment.

After discussing the finding of *Goss* as to objectional one-way transfer provisions, the district court said:

> However, the Court expressly recognized that a transfer provision or policy which did not contain a racial classification and which allowed transfers as readily to a school in which the applicant would be in a racial minority as it allowed transfers to a school in which the applicant would be in a racial majority would be valid. The Court therefore did not hold that integration is a required end result of the provisions or policy. *And, as we said in our earlier opinion in this very action* (221 F. Supp., 968, 974), *it is difficult to see how it could be held that segregation resulting from purely voluntary choice could violate the Fourteenth Amendment as it would not be "state-imposed separation."* Similarly, it is difficult to see, for the same reason, how it could be held that segregation that resulted from "honestly" arrived at geographical zoning could violate the Fourteenth Amendment. We therefore conclude, as we concluded before, that the Constitution does not require integration and that it only requires the abolition of compulsory segregation based on race.

Turning from the federal courts to the State Supreme Courts we find the case of *James Tomex et al.* v. *Board of Education, Waukegan City School District*, rendered by the Supreme Court of the State of Illinois in March, 1967. In this case the Court said (a complete copy of the opinion of the Court being attached as Appendix 26, pages A273 to A287):

> Section 10—21.3 of the Illinois School Code (Ill. Rev. Stat. 1965, chap. 122, par. 10—21.3), commonly called the Armstrong Act, provides in part: "As soon as practicable, and from time to time thereafter, the board shall change or revise existing units or create new units in a manner which will take into consideration the prevention of segregation and the elimi-

nation of separation of children in public schools because of color, race or nationality." Sections 10—20.11, 34—18 (7) and 34—22 of the Code have a provision similar to the quoted provision.

The principal question presented by this appeal is whether the provision requires school boards to prevent and eliminate "de facto segregation" or "racial imbalance" and whether such a requirement violates the equal protection clause of the Fourteenth Amendment and section 22 of article IV of our constitution. . . .

When this action was commenced the percentage of Caucasians and Negroes in Whittier and adjacent attendance units was as follows:

Name of School	Percentage of Caucasians	Percentage of Negroes
Whittier	15%	85%
Clearview	100%	0%
Glen Flora	98%	2%
Glenwood	100%	0%
Hyde Park	100%	0%

. . . Under the court's decree, the distribution of Caucasian and Negro children in the Whittier and surrounding attendance units is as follows:

Name of School	Percentage of Caucasians	Percentage of Negroes
Whittier	57.4%	42.6%
Clearview	100 %	0 %
Glen Flora	83.0%	17.0%
Glenwood	83.6%	16.4%
Hyde Park	79.9%	20.1%

. . . We hold that the apparent purpose of the Armstrong Act is that school boards shall as soon as practicable eliminate racial imbalance. . . .

Racial discrimination is, of course, the act of making distinctions based on race. A reading of *Brown II* indicates that the principle announced in *Brown I* was that a distinction or classification based on race is arbitrary, capricious and unreasonable. It would seem to follow that any law containing a racial classification is arbitrary and unreasonable and violates the equal-protection clause of the Fourteenth Amendment. . . .

Plaintiffs are quick to point out that the issue here, as contrasted with the cases above cited, is not whether the Fourteenth Amendment requires State authorities to correct racial imbalance in its schools. Rather, they assert, the question is whether the Fourteenth Amendment *prohibits* State authorities from correcting racial imbalance. . . .

As we have indicated, several States have again entered the field of racial classification in education albeit for what they now consider a proper governmental goal. As one commentator has pointed out, "This is exactly what the plaintiffs' attorneys urged the Supreme Court to prohibit in the *Brown* case, and for good reason. Although today a court might rule that the state is required to consider race in a benign way, tomorrow this might well prove a precedent for a much less happy result. Moreover, even today it is not easy to decide whether a given racial classification is benign." Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 Nw. U. L. Rev. 157, 188 (1963). . . .

While the Act does not use the terms "racial imbalance" or "de facto segregation" we feel that the purpose of the Act is to eliminate racial imbalance. This raises a question of when a school is racially imbalanced. Here, the trial judge felt Whittier was racially imbalanced when it had 85% Negroes and was not when it had 42.6% Negroes. But the legislature has not indicated to the school boards what constitutes a racially imbalanced school. . . .

> If the purpose of the Armstrong Act is to eliminate racial imbalance, it would appear to be for integration qua integration without any determination that it would promote equal educational opportunities. . . .
>
> The dissent to this opinion asserts that we have declared the Armstrong Act unconstitutional because we found the General Assembly was motivated by an improper purpose. This is simply not true and is actually completely contrary to our holding. Our holding is that programs to create equal educational opportunities must under the equal protection clause of the Fourteenth Amendment and under section 22 of Article IV of our constitution be administered without regard to race. This is the *neutral* application of the statement in *Brown II*—"the fundamental principle (is) that racial discrimination in public education is unconstitutional." Just as the neutral principle of free speech protects speech which may or may not be socially desirable, so also does the principle prohibiting racial discrimination in public education prevent this type of legislation regardless of the General Assembly's purpose. . . .
>
> We hold that the Armstrong Act is unconstitutional. The judgment of the circuit court of Lake County is accordingly reversed.

The conflict between the Fifth Circuit in *Jefferson County* and this three-judge court on the one hand and the Courts of Appeals of the other Circuits and the State Courts on the other hand includes not only a clash of basic constitutional concepts but also the practical application thereof to the administration of schools.

In *Bradley* v. *School Board of Richmond,* 345 F.2d 310, vacated and remanded on other grounds, 382 U.S. 103 (1965), a majority of the Fourth Circuit sitting en banc approved without qualification a freedom-of-choice plan

similar to many of those submitted by the forty-eight school systems rejected here by order dated April 17, 1967. In reply to the appellants' insistence that the plan there considered was unconstitutional because the preferences of Negro parents for predominantly Negro schools "result(ed) in the continuance of some schools attended only by Negroes," the Fourth Circuit said:

> It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. . . . There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous. . . . There is no hint (in *Brown*) of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal rights of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.

To their contention that a freedom of choice plan is adequate only if it is combined with geographic assignments based on residence, as provided in Section I (d) of the decree here (pp. A14-A15), the Fourth Circuit concluded:

> We find, however, that an underlying geographic plan is not a prerequisite to the validity of a freedom of choice plan. A system of free transfer is an acceptable device for achieving a legal desegregation of schools. Its acceptability is not dependent upon the concurrent use of some other device which also might.

> be adequate. . . . Imposed discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic basis. . . . The other means (in addition to geographic zoning) of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and, administratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils.

As late as June, 1967, the Fourth Circuit considered similar problems in *Bowman* v. *County School Board of Charles City County, Virginia*, (June 12, 1967—not yet reported), and in *Green* v. *County School Board of New Kent County, Virginia*, (decided June 12, 1967—not yet reported), which reaffirms its position as follows:

> In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged, "unrestricted right" to attend any school in the system he wishes. They contend that compulsive assignment to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention. . . .
>
> If each pupil, each year, attends the school of his choice, the constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held and we adhere to our holdings.

The storm engendered by the Fifth Circuit and this three-judge court departing from accepted precedence is further illustrated by the decision of the Eighth Circuit in *Clark* v. *Board of Education of Little Rock School Dis-*

trict, 369 F.2d 661 (8th Cir., 1966), rehearing denied 374 F.2d 569 (8th Cir., 1967). The assignment features of the plan approved by the Eighth Circuit in *Clark* were the same as those in the Fourth Circuit decisions: an unrestricted freedom-of-choice plan with no provision for geographic assignments on failure to make a choice. The court rejected the contention that the constitutionality of a plan depends upon whether it "works" in achieving numerical results, saying:

> Thus, they (plaintiffs) argue that the "freedom of choice" plan is not succeeding in the integration of the schools.
>
> Though the board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. . . . The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. . . :
>
> In short, the constitution does not require a school system to force a mixing of the races in schools according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional.

Regarding the validity in general of a freedom-of-choice plan of the sort which petitioners urged the Fifth Circuit to allow, the Eighth Circuit concluded:

> Notwithstanding the H. E. W. Guidelines and the recent opinion of the Fifth Circuit (in *Jefferson County*), when a student is given a well publicized annual right to enter the school of his choice, coupled with periodic mandatory choices as set forth in the Board's amended plan, we can find on the face of it

no unconstitutional state action. We find no state act that results in discrimination against Negroes (374 F.2d at 571). . . .

> Therefore, if in fact all the students wishing to transfer were fully accommodated, the constitution would unquestionably be satisfied. . . . (374 F.2d at 572). . . .
>
> If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to the classrooms. We find no unlawful discrimination in the giving of students a free choice of schools (369 F.2d at 666).

With respect to the contention that a free choice plan must provide for a mandatory annual choice with geographic assignments on failure to choose, the Eighth Circuit stated:

> They are afforded an annual *right* to transfer schools if they so desire. The failure to exercise this right does not result in the student being assigned to a school on the basis of race. Rather, the student is assigned to the school he is presently attending, by reason of a choice originally exercised solely by the student (369 F.2d at 668). . . .
>
> On its face, we believe that the plan, as approved by us, is proper and constitutional, and appellants have made no showing that this non-mandatory freedom of choice plan to laterally transfer schools had infringed their constitutional rights (374 F.2d at 571).

Although at first glance it might appear that the Tenth Circuit is at variance with the above cases in *Board of Education of the Oklahoma City Public Schools* v. *Dowell*, ... F.2d ..... (10th Cir., January 23, 1967), *cert. denied*, 25 U.S.L. Week 3418 (U.S. May 29, 1967), this decision was

bottomed upon an express finding of bad faith by the school board involved. On the other hand, the Tenth Circuit reaffirmed its decision in *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (1964), in which the court had said:

> Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend schools with them.

9.

The Requirements of the Decree Here, the HEW Guidelines and the Decree in Jefferson County Are in Direct Violation of the "Mandate of Congress" and the "Voice of the Nation" As Expressed in the Civil Rights Act of 1964

For the convenience of the Court we repeat here the detailed requirements of the decree which require action by the State Superintendent of Education of Alabama contrary to the Constitution and Statutes thereof. These requirements are directly contrary to the prohibitions contained in the Civil Rights Act of 1964. These include the following:

(a) The placement, assignment and transfer of students.

(b) The transfer or reassignment of teachers.

(c) The closing of public schools.

(d) The control of expenditure of funds in the nature of grants-in-aid to students in the public school system.

(e) The furnishing, direction and control of the transportation of pupils.

(f) The location and construction of school facilities.

These requirements of the decree violate the express provisions of the Civil Rights Act of 1964. If jurisdiction is noted herein, in our brief submitted to the Court we will point out the legislative history supporting our position. However, for the present purposes, we simply quote the provisions of the Civil Rights Act of 1964 which are violated by the decree:

Section 401 (b): ". . . but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 407 (a): ". . . provided that nothing herein shall empower *any official or court of the United States* to issue any order seeking to achieve a racial balance in any school by *requiring the transportation of pupils* from one school to another or one school district to another in order to achieve such racial balance *or otherwise enlarge the existing power of the court* to insure compliance with constitutional standards."

Section 410: *"Nothing in this title shall prohibit classification and assignment* for reasons other than race, color, religion, or national origin"

Section 604: ". . . nothing contained in this Title shall be construed to authorize action under this Title by any Department or Agency with respect to any employment practice of any employer."

Section 701 (*b*) of Title VII—Equal Employment Opportunity—specifically excepts: ". . . a state or political subdivision thereof."

Section 702: "This title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

10.

The Judicial Compulsion Without Due Process of Law

The attorneys for the United States of America (the only actively participating Plaintiff, as Intervenor, and the only actual appellee here) are now prosecuting this suit against state officials of Alabama as the conduit of funds. However, this is actually a suit against ninety-nine school districts, none of which were parties to the suit when it was tried, when volumnious evidence was introduced, many depositions taken and copies of extensive records placed in evidence. The officials of these school districts had no opportunity for their attorneys to cross-examine a single witness, to introduce any evidence or otherwise to participate in the proceeding.

Although this Court can have no jurisdiction over any of the school districts located in either the Northern District of Alabama or the Southern District of Alabama (and questionable venue of those not located in the Division of the Middle Dist. ict in which this court was constituted), it has used its judicial eminence and judicial power to require actions by every school district in the State of Alabama, with the exception of the Macon County Board of Education and the other school districts already under court order.

"The meat in the coconut" is continued in the following extract from the decree dated March 22, 1967 (pp. A7-A8):

> The State Superintendent of Education shall notify the following school systems that they are required to adopt a desegregation plan for all grades commencing with the 1967-68 school year that meets the standards embodied in the plan attached to this decree and designated as Exhibit "A":

Alexander City	Auburn	Andalusia
Autauga County	Anniston	Baldwin County
Athens	Bibb County	Attalla
Fort Payne	Blount County	Franklin County
Brewton	Geneva County	Butler County
Greene County	Calhoun County	Henry County
Carbon Hill	Houston County	Chambers County
Jackson County	Cherokee County	Jacksonville
Chilton County	Jasper	Clarke County
Lamar County	Lanett	Clay County
Cleburne County	Lauderdale County	Coffee County
Lee County	Colbert County	Limestone County
Conecuh County	Linden	Coosa County
Marengo County	Covington County	Marion
Cullman	Marion County	Cullman County
Marshall County	Dale County	Monroe County
Daleville	Morgan County	Dallas County
Mountain Brook	Decatur	Muscle Shoals
DeKalb County	Oneonta	Dempolis
Opelika	Dothan	Opp
Elba	Ozark	Elmore County
Phenix City	Enterprise	Pickens County
Escambia County	Piedmont	Etowah County
Pike County	Eufaula	Randolph County
Fayette County	Roanoke	Florala
Russell County	Florence	Tallassee

Russellville	Tarrant	St. Clair County
Thomasville	Scottsboro	Troy
Selma	Tuscaloosa	Sheffield
Tuscaloosa County	Shelby County	Tuscumbia
Sumter County	Walker County	Sylacauga
Washington County	Talladega	Winfield
Talladega County	Winston County	Tallapoosa County

The State Superintendent of Education shall inform these local school systems that the desegregation plan is to be adopted within 20 days from the entry of this decree; and within 25 days from the entry of this decree the State Superintendent of Education shall submit a report to this Court and to all parties informing them of the action taken by him to discharge this obligation and the results of that action.

Thereafter the use of judicial compulsion without due process of law was continued by order of the three-judge court dated April 24, 1967 appearing as Appendix 10 (pp. A175-A179) which included the following:

It is FURTHER ORDERED that the defendant Ernest Stone, as State Superintendent of Education, forthwith notify each of the following school systems that the desegregation plan which such system has adopted for all grades commencing with the 1967-68 school year and which was submitted to this Court by the State Superintendent on April 17, 1967, fails to meet the standards embodied in the plan attached as Exhibit "A" to the decree of March 22, 1967, and that a plan meeting such standards should be adopted and submitted to the State Superintendent:

Andalusia	Franklin County	Athens
Geneva County	Attalla	Greene County
Brewton	Henry County	Butler County
Houston County	Carbon Hill	Jackson County
Cherokee County	Jasper	Chilton County

Lauderdale County	Clarke County	Limestone County
Clay County	Linden	Colbert County
Marengo County	Conecuh County	Marion City
Covington County	Marion County	Dale County
Morgan County	Dallas County	Muscle Shoals
DeKalb County	Piedmont	Demopolis
Scottsboro	Etowah County	Selma
Eufaula	Shelby County	Florala
Talladega City	Florence	Tallapoosa County
Tarrant	Tuscaloosa City	Thomasville
Tuscaloosa County	Troy	Tuscumbia

and, more specifically, advising said school systems that their desegregation plans should be revised in the following regards:

> Those of the above-named systems that have patterned their plans upon the model attached to the Court's decree but have omitted from their plans any of the provisions of the Court's decree or have changed any of the provisions of the Court's decree shall revise their plans to include all provisions of the Court's decree without material change except where specific variations from the model plan are required by circumstances peculiar to the particular school system making such change. If any such changes are retained in a plan as amended, the school system should set forth the particular justification for the change.

It was said long ago that "Coming events cast their shadows before". A reading of the decree and even the opinion here does not reveal the shadows inherent therein. However, even in this short time, the shadows are lengthening. The decree appealed from and its companion opinion lay a foundation to support every method of forceable integration foreshadowed by *Jefferson County*. This is not all.

The closing of certain grades of schools, the closing of entire schools, the employment of every artifice devised by the Commission on Civil Rights, the United States Commission of Education and the Department of Justice has already begun. For the convenience of the Court we quote from order entered by the three-judge court on June 14, 1967 (pp. A236-A237).

NOW THEREFORE IT IS ORDERED:

1. The Marion County Board of Education, Earl Hampton, Chairman, Lee Hightower, A. J. Wood, Carl Byrd, and Robert Hester, members of the Marion County Board of Education, and Estes Hudson, Superintendent of Schools of Marion County, together with their officers, agents, employees, successors and all persons in active concert or participation with them, are enjoined to:

(a) adopt a desegregation plan for the Marion County School System in the form attached as Exhibit "A" to this Court's decree of March 22, 1967, and to fully carry out such plan;

(b) *close all grades of the Guin High School* prior to the start of the 1967-68 school year and assign each teacher now employed at the Guin High School to other schools in the Marion County School System in a manner to effect the desegregation of faculties in the system;

(c) *discontinue grades 10, 11 and 12* at the Ada Hanna High School prior to the beginning of the 1967-68 school year;

(d) provide each student who has heretofore chosen to attend any grade in the Guin High School or any of grades 10 through 12 in the Ada Hanna High School for the 1967-68 school year with an additional 15-day choice period within which to choose another school in the Marion County School System;

(e) formulate a plan by which, commencing with the 1968-69 school year, *grades 7 through 9 will be offered at no more than one of the following three schools: Byrd, Ada Hanna and Gravel Springs;* and

(f) serve upon the plaintiffs and the United States and submit to the Court, within 30 days of the date of this order, a report which shall describe all steps taken to implement paragraphs 1(a) through (e) above, and the results thereof.

In the same order the court required the officials of the Marengo County School System to close the Dayton, Varner, Glover and Exmoor schools prior to the commencement of the 1967-68 school year and that they close the Taylor, St. Johns and Jones Chapel Schools commencing with the 1968-69 year, and to close certain other schools named in the order as soon as financially feasible. The students in these schools will necessarily be assigned to other schools.

Neither the United States Commissioner of Education, the Department of Justice nor the civil rights organizations with which they cooperate move in a vacuum. *In order to see the end of the road,* it is necessary that the pieces of the puzzle be recognized and put together. Only then does the full picture emerge.

Fifteen procedures are detailed in the proposed form of the "Equal Educational Opportunity Act of 1967" as hereinafter quoted. They are clarified by the Report of the United States Commission on Civil Rights which was released on February 20, 1967. The policy of the Civil Rights organizations (supported by the Department of Justice) has been a course of gradualism. Initially certain positions are taken and words used; then these positions are slightly changed and the meanings of the words used are also changed; then different words are substi-

tuted and the final result is quite different from that contemplated in the decisions of the courts obtained under the original advocacy of these Civil Rights organizations and the Department of Justice.

This is demonstrated by the means and methods intended to be utilized in the proposed "Equal Educational Opportunity Act of 1967". It is further illustrated by the terms used and the application thereof in the majority opinion in *Jefferson County* and the decree and parts of the opinion in this case as accentuated by the above Report of the United States Commission on Civil Rights.

The proposed recommendations to Congress to be included in the Equal Educational Opportunity Act of 1967 were placed in the Congressional Record on or about September 24, 1966, by Congressman Fino. Such recommendations include the following procedures to obtain the "desegregation" or "integration" of schools:

(1) Comprehensive, district-wide rezoning of school attendance areas to obtain maximum heterogeneity.

(2) Pairing, grouping or clustering of adjacent Negro and white schools with a division by grade level in two or more residential areas.

(3) Reorganization of the use of schools; reorganizing the grades of a school; converting schools to other uses; closing schools; changing feeder patterns; grade pattern reorganization.

(4) Careful site selection to locate new schools so as to maximize integration of residentially segregated student populations.

(5) Increased busing from overcrowded to underutilized schools.

(6) Development of "magnet" high schools, each specializing in a different subject area with enrollment

open to the entire school district on the basis of interest rather than ability.

(7) Development of supplemental educational centers, comprehensive community schools and shared time programs to draw district-wide enrollment as well as participation from private and parochial schools.

(8) Open enrollment, voluntary enrollment and free transfers.

(9) Creation of metropolitan school districts to include urban and suburban areas.

(10) Suburban-Inner City pupil exchanges.

(11) In-class pupil grouping to avoid racial separation, development of up-graded primary classes, remedial and compensatory programs within the framework of regular classroom structure.

(12) In-service training for teachers and other school personnel; employment of specialists to advise school personnel, parents, children and the public on problems of desegregation; improving guidance and counseling services.

(13) Development of new curricular materials, particularly those including proper representation of racial and religious minorities.

(14) Teacher assignment to assure faculty integration at all schools.

(15) Improvement of recruitment and advancement of minority group teachers who are motivated to teach in ghetto schools and in transitional programs.

Harold Howe, II, United States Commissioner of Education, testified under oath (pages 192 to 193 of his deposition in this case) as follows:

Q. However, Mr. Howe, would you testify to the Court that the United States Office of Education does

not intend to participate in the preparation or recommend legislation generally to this effect?

A. No, I would not testify to the Court in that regard because it seems to me sometime in the future, the Office of Education might like to make available Federal support to local communities which wish to use that support for these purposes, the possibility of developing such activities on local decisions. Isn't that Congressman Fino's introduction?

Q. Yes, it is.

A. I thought it was.

The Report of the United States Commission on Civil Rights released on February 20, 1967, contains a discussion of "School Desegregation: Extent and Techniques" at page 140 et seq. Such Report points to the *end of the road* as contemplated by the parties to this suit, even though many actions are presently disguised or lightly touched upon in the decree in this case. The following are of particular interest:

1. There never has been any intention by the civil rights protagonists and the Department of Justice to distinguish between "de facto" and "de jure" segregation. The intention is to accomplish complete, absolute and overall integration to a *racial balance* regardless of the use of such terms temporarily as an expedient to bring about the final end. An illustration of this appears on page 141 of the Report as follows:

> Smaller communities have used a variety of techniques to accomplish desegregation, but a common element is the *enlargement of attendance areas* to overcome the obstacle of residential segregation. Among these devices are *"pairing", the establishment of "central" schools,* and *the closing of a majority-Negro school and dispersal of its students among other schools in the community.*

> *Pairing involves merging the attendance areas of two or more schools* serving the same grades *to achieve better racial balance.*

2. The reference in the majority opinion in *Jefferson County* to the "Princeton Plan" and actions taken by the three-judge court subsequent to the decree are clarified by the Commission's Report on page 142 thereof as follows:

> School pairing was introduced in 1948 in Princeton, N. J., a community which had been served by two elementary schools, one nearly all-white and the other Negro. *The school system merged the attendance areas of the two schools and assigned all students in grades K-5 to one school and all students in the remaining grades, grades 6-8, to the other.* As a result of the pairing, each of Princeton's elementary schools became majority-white.

3. The complete disregard of proper educational bases in order to bring about integration is illustrated by the reference made on page 142 of the Commission's Report to actions taken in Princeton, New Jersey, and Greenburgh, New York.

> The Princeton and Greenburgh examples show that in very small communities pairing may result in the establishment of central schools whereby one school building becomes a central facility for several grades servicing the entire school district. In communities which have a larger number of schools, central schools also can be established by making the whole district a single attendance zone for all students in one or two grades. In this way, the grades served by the central school are fully desegregated and resegregation that might otherwise occur through shifts in racial residential patterns within the community is precluded.

4. Another method which may be utilized in this case and *Jefferson County* under the respective decrees is discussed on pages 143 et seq. of the Report under the heading "School Closing". This describes another means of obtaining *racial balance* in schools and states, "Another means of desegregating schools by enlarging attendance areas is the closing of a particular school and the dispersal of the students among the remaining schools." Reference is then made to action taken in White Plains, New York, and the following statement is made:

> Another means of desegregating schools by enlarging attendance areas is the closing of a particular school and the dispersal of its students among the remaining schools.
>
> Thus there have been several examples of successful school desegregation in smaller communities. A variety of devices has been used, individually or in combination, but in each case a major element has been the enlargement of the attendance areas and a return to the older concept of the community school, where a more representative cross section of a city's children attended school together.
>
> Efforts to *reduce racial imbalance* in most big cities fall generally into three categories: (1) those which seek to *reduce imbalance* without altering existing attendance areas; (2) those which alter or enlarge attendance areas; and, (3) those which involve cooperation between suburban and central city school jurisdictions.
>
> A number of big city school systems have attempted to *reduce racial imbalance* without altering established attendance areas. Devices used include open enrollment and busing.
>
> Some school systems have sought to *relieve racial imbalance* by transporting Negro children from their normal attendance areas to predominantly white schools in other parts of the city.

5. The intention of federal authorities to control textbooks or "educational materials" is demonstrated by the statement on page 159 of the Report, which is as follows:

> Another contribution to interracial understanding has been *the introduction of multiracial curriculum materials*. Integrated teaching materials often are used in newly desegregated schools. For example, in Syracuse, an integrated basic reader is used in all elementary schools. In addition, the history of Negro Americans has been incorporated into the regular curriculum for the 1966-67 school year at all grade levels. The Berkeley schools have published a book based on the experiences of minority children participating in an all-day field trip. In other school systems teachers developed their own biracial materials when the school system did not provide such materials or where, though provided by the system, *the materials were judged inadequate.*

6. Another expedient which will be required is that of the maintenance of "magnet schools" as set forth on page 165 of the Commission's Report as follows:

> Magnet schools which offer specialized courses designed to attract white as well as Negro students constitute a variation of the specialized high schools found in many of the Nation's cities, such as Bronx Science in New York and Boston Latin in Boston.
>
> Philadelphia has begun a program providing for magnet schools, financed in part with Federal funds. When fully implemented, three senior high schools will have special academic programs. Each school will have one area of specialization: commerce and business, space and aeronautical science, or government and human service.
>
> In addition, two desegregated middle schools serving grades 5 through 8 have been proposed; each will stress individualized instructions, innovations in teaching, and the flexible grouping of students. Four ele-

mentary schools will have intensive programs in reading and science, again stressing individual attention for students. School officials view the middle and elementary magnet schools as *a means of retaining a racial balance* in the student population by providing superior education.

7. Another requirement which will be developed under the decree here, *Jefferson County* and the HEW Guidelines or otherwise is that of "educational complexes". A full discussion appears on page 166 of the Report, the basic approach being as follows:

> Proposals for education complexes would broaden attendance areas by grouping existing schools and consolidating their attendance zones. The clusters might then draw *a more racially and socially heterogeneous student body*. Specialized teachers and facilities could be made available to more students.
>
> Each complex would consist of two to eight elementary schools, all feeding one to three middle or junior high schools. Complexes might be arranged so that all elementary schools would be within approximately 20 minutes *by bus* from each other.

8. *Another basis of obtaining racial balance* is that of the use of "educational parks". This is discussed on pages 167 et seq. of the Report, the most important basic approaches being stated as follows:

> Education park proposals thus far generally contemplate a grouping of several racially desegregated schools serving a student population which may range from 5,000 to 30,000. The proposals vary with respect to such factors as appropriate size, grade organization, and population to be served.
>
> One plan, appropriate for smaller cities, would assemble on one campus all schools—elementary, junior, and senior high—and all students in the community. Another proposed form of organization for larger cities

would be *to assemble in one park all of the school facilities at a particular level*—for example, all of the middle schools or high schools. Other plans for larger cities contemplate a park which would be of comparable size—assembling two or three elementary, junior, and senior high schools—but which would not serve the entire city. The most comprehensive type of proposal for large cities would establish several parks, each serving a different section of a city or a metropolitan area.

9. The true intent concerning the busing or transportation of students under these decrees and the HEW Guidelines is discussed on pages 180 et seq. of the Report of the United States Commission on Civil Rights mentioned above. The basic approach is set forth on such pages, including the following:

> Another aspect of the feasibility of education parks involves the *increased need to transport children* which would result from the enlarged attendance areas.
>
> The study revealed there are many locations in the area where Negroes and suburban whites could attend education parks together with relatively little travel time. The report indicated that travel time for most students could be limited to less than 40 minutes.
>
> A final consideration of feasibility is the need for intergovernmental cooperation which would be entailed in education park plans that contemplate drawing students from suburban jurisdictions as well as from the city. School boards either would have to merge or share authority, staff and funds. State education agencies might have to sanction these arrangements.

The end is not yet. Only the imagination of man limits the lengths to which the Civil Rights protagonists will go to attain their desires.

11.

This Appeal Affects Not Only Ninety-Nine School Districts in Alabama but Also All of the Two Thousand and Two School Districts in the Seventeen States Now Affected by the Actions of HEW and Many Thousands of School Districts in Other States Which Will Hereafter Be Affected Hereby

The importance of this appeal cannot be minimized. It involves basic principles which will be applicable to every school district in the United States of America. If this appeal is noted and docketed by this Court, the chaos now existing in the field of public education will be resolved. Whether such determination will be consistent with the position of the appellant or consistent with the position of the appellee is immaterial at this juncture. The overwhelming importance of the consideration of this Jurisdictional Statement is the necessity that the educational authorities in all of the thousands of local school districts in the United States (whether located within the seventeen states here particularly affected or not) may be able to determine their rights, duties and responsibilities under the Constitution of the United States.

Hence, we respectfully submit that this Court should accept this Jurisdictional Statement and should consider this appeal in the absence of a motion to dismiss or affirm or, in the alternative that any motion to dismiss or affirm

should be overruled and the case placed upon the docket for full consideration by the Court.

Respectfully submitted,

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PROOF OF SERVICE

I, John C. Satterfield, Attorney, one of the attorneys for Lurleen Burns Wallace, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; Alabama State Board of Education; Ernest Stone, Secretary and Executive Officer of Alabama State Board of Education; James D. Nettles, Ed Dannelly, Mrs. Carl Strang, Fred L. Merrell, W. M. Beck, Victor P. Poole, W. C. Davis, Cecil Ward and Harold C. Martin, as members of Alabama State Board of Education, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of August, 1967, I served copies of the foregoing Jurisdictional Statement in the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with air mail postage pre-

paid to the Office of Ben Hardeman, Esq., United States Attorney for the Middle District of Alabama, at Room 302, Federal Building, Montgomery, Alabama, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C.

2. On the Plaintiffs and Plaintiff-Intervenor and Amicus Curiæ, by mailing copies, in a duly addressed envelope, with air mail postage prepaid, to the respective attorneys of record as follows:

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